In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 693

FEDERAL POWER COMMISSION, PETITIONER

v.

M. H. MARR, SUN OIL COMPANY, CONTINENTAL OIL COMPANY, GENERAL CRUDE OIL COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

I

Respondents argue (Br. pp. 51–58) that in setting aside the Commission's original order granting a certificate the Court of Appeals for the District of Columbia Circuit determined that the Commission lacked jurisdiction over the leasehold transfer, and that this determination became the law of the case, effectively foreclosing the jurisdictional issue presented here. This question was briefed in the court below but left open by the Fifth Circuit (R. 1288–1289).

A. Nothing in the mandate of the court of appeals foreclosed reconsideration of the jurisdictional issue,

because the court did not rule upon it. The Commission's original order granting Texas Eastern a certificate to construct facilities was admittedly based upon the expressed view that the FPC lacked authority to certificate the leasehold transfer itself (R. 456). But that aspect of the Commission's decision never became an issue in the court of appeals. The New York Public Service Commission, sole petitioner in the proceeding, did not challenge the Commission's view that it had no jurisdiction over the leasehold sale; indeed the New York Commission explicitly endorsed that view, both before the FPC and before the District of Columbia Circuit.[1] Its only argument was that, regardless of the jurisdictional status of the in-place sale, the Commission was obliged to apply the "in-line" price standard of *Catco* in determining whether the proposed construction of facilities would serve the public convenience and necessity. And the court of appeals addressed itself to that question alone.

Indeed, under the governing statute, the question of the Commission's jurisdiction over the transfer of the leases was one which the court of appeals could not have considered even if raised by the New York Public Service Commission or another dissatisfied party. Section 19(b) of the Natural Gas Act (15

[1] See petition and brief filed by petitioner in *Public Service Commission of the State of New York* v. *Federal Power Commission*, C.A.D.C. No. 15412. Indeed, the petition had annexed to it as an "exhibit" the New York Commission's application to the FPC for rehearing, in which it expressly approved the Commission's jurisdictional position (R. 469).

U.S.C. 717r(b)) bars the reviewing court from passing upon any question not raised by a timely application for rehearing to the Commission.[2] That requirement has been rigorously and consistently enforced, both by this Court and the courts of appeals.[3]

Nor can it be said that the question of the Commission's jurisdiction over the sale of the leases was "an issue inherent in the controversy" (Resp. Br. 54)—one necessarily decided in resolving the question that was presented for decision (*i.e.*, whether the Commission was required to take the price of the leases into account in passing upon the pipeline's certificate application). The court of appeals noted explicitly that the assumed absence of regulatory control over the sale was "of no importance here" and that "the Commission's warrant to inquire [into Texas Eastern's acquisition costs] arises by virtue of its responsibility to regulate the purchaser, regardless of the status of the seller" (287 F. 2d at 146; R. 866).

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[2] The Federal Power Act contains an identical provision. 16 U.S.C. 825*l*.

[3] *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continental Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 650–651; *Utah Power & Light Co.* v. *Federal Power Commission*, 339 F. 2d 436, 438 (C.A. 10); *Street* v. *Federal Power Commission*, 277 F. 2d 357 (C.A.D.C.); *Pan American Petroleum Corp.* v. *Federal Power Commission*, 268 F. 2d 827, 830 (C.A. 10); *Dayton Power & Light Co.* v. *Federal Power Commission*, 251 F. 2d 875, 876 (C.A.D.C.); *Continental Oil Co.* v. *Federal Power Commission*, 247 F. 2d 904, 907–908 (C.A. 5); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785, 789 (C.A. 5), certiorari denied, 352 U.S. 968.

Since the court of appeals did not decide the jurisdictional issue in controversy here, it was entirely appropriate for the Commission to reconsider the question upon remand. The court's mandate, which required only that the Commission respect the grounds of the court's decision, left it free to reopen the entire case, to re-examine any issues, and to take any other action consistent with the mandate that it deemed appropriate to the performance of its statutory functions. "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. * * * But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145. The Commission was bound to respect the rules of law laid down by the court on review but, equally, "[a]fter the remand was made * * *, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201.

B. Nor can it be argued that the Commission was precluded from asserting jurisdiction over the sale by virtue of its earlier disclaimer of such authority. An agency charged with responsibility for carrying out an important Congressional policy—here, that of protecting the consuming public against excessive gas prices—is not barred from taking appropriate action to

that end because of a mistake of law it may have made in the past. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678, fn. 5; *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 123; *Wilbur* v. *United States*, 281 U.S. 206, 217; *American Trucking Assns.* v. *United States*, 344 U.S. 298, 314. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134. It is Congress which fixes the scope of the Commission's jurisdiction, and the fact that the Commission may previously have taken a too narrow view of its responsibilities does not alter the requirements of the statute. Moreover, the public interest in uniform administration of the Act would obviously not be served by granting to these petitioners an immunity from regulatory requirements which, if we are correct, will apply to all others similarly situated.[4] See *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 236; Davis, *Administrative Law Treatise*, Vol. 2 (1958 ed.) p. 564.

Whatever problems might be presented if the Commission had sought to reopen a matter in which its order had become final and unreviewable, that is not the case here. The Commission's order granting a certificate to Texas Eastern was promptly challenged in the District of Columbia Circuit. It therefore remained open to modification, subject only to the requirement that the Commission act consistently with the court of appeals' mandate.

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[4] See *Federal Power Commission* v. *Pan American Petroleum Corp.*, pending on petition for certiorari, No. 1024, this Term, which does not involve the law of the case issue, but does present the same question as to the Commission's jurisdiction under the Natural Gas Act.

By the same token, respondents cannot claim that they were prejudiced by the Commission's change of view. They were aware that they acted at their peril if they proceeded with their plans while the certificate issued to them was being challenged. Nor have they been unfairly burdened. The court of appeals' mandate in any event required them to submit to a new administrative proceeding in which they would be called upon to demonstrate the reasonableness of their price.

II

Respondents do not seriously dispute our contention that the transaction in question, viewed in terms of the economic realities, is substantially equivalent to a conventional sale of gas at the wellhead. Their argument, as we understand it, is that, as a matter of State conveyancing law, the instruments they executed were legally effective to give Texas Eastern a leasehold interest in real property, *i.e.*, a right to enter, bring the gas to the surface, and thereafter reduce it to possession and ownership. In this, we shall assume, they are correct. Such a conveyance of real property interests, respondents continue, is neither a "sale * * * of natural gas" nor a sale "in interstate commerce" because it does not pass title to the natural gas as a commodity. Here, we disagree. The central issue between the parties, then, is whether the character of the transaction as a "sale in interstate commerce of natural gas" is to be determined on the basis of technical concepts drawn from the State law of property or sales, as respondents urge, or, as the Commission held, in accordance with the regulatory

objectives of the federal Act. We submit—and the decisions of this Court support our view—that the terms of a regulatory statute must be construed with a view to the economic realities and in furtherance of the basic purposes of the legislation.

This thesis is, of course, elaborated in our main brief. At this point, however, we wish to invite particular attention to *Gray* v. *Powell*, 314 U.S. 402, a case not previously discussed in this connection but one which bears striking similarities to the case at bar.

Gray v. *Powell* involved the interpretation of the Bituminous Coal Act of 1937, which prescribed a code of regulations for the soft coal industry, set up a commission to administer it, and imposed a heavy excise tax on "the sale or other disposal of bituminous coal" by producers other than those choosing to come under the code. One of the code provisions, set forth in Section 4–II of the Act, was that "No coal * * * shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code * * * " (314 U.S. at 404). The Seaboard Air Line Railway Company, a large consumer of coal, leased certain coal properties from the landowners and simultaneously contracted with various operators to run the mines and deliver the entire output to Seaboard for its own consumption. Seaboard claimed that its coal was not covered by the code because there had been no "sale or delivery or

offer for sale" by the producers (*i.e.*, the operators); rather, it was argued, the coal had belonged to Seaboard from the outset by virtue of its leasehold interest in the underlying lands. This Court rejected that contention, holding that "the purpose of Congress, which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party within the ambit of the coal code" (*id.* at 416). By the same token, we submit, the plain purpose of the Natural Gas Act would be hampered, if not defeated, by reading "sale" of "natural gas" to include only contracts passing title to the gas as personal property and to exclude transfers of leasehold interests serving essentially the same economic function.[8]

At one stage of this case, respondent Continental aptly described its revised transaction as one to "sell their gas in place" (R. 426). Viewed, as it must be, in terms of the regulatory objectives of the Natural

[8] Similarly, in dealing with phrases like "employee" and "arising out of and in the course of employment," the Court has repeatedly rejected the formulas used to determine the tort liability and fiduciary duties under the common law of agency. *E.g.*, *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 127; *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 481. It has looked instead to the policy of the Act, inquiring whether "the particular workers * * * are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and the remedies it affords are appropriate for preventing them or curing their harmful effects * * *" *National Labor Relations Board* v. *Hearst Publications, Inc.*, *supra*, 322 U.S. at 127.

Gas Act, an "in place sale," by that or any other name, is still a sale of gas.

Respectfully submitted.

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